(37)

Supreme Court of the United States

OCTOBER TERM, 1944

No. 468

DEBS MEMORIAL RADIO FUND INC. and
HENRY GREENFIELD,

Petitioners,

vs.

ASSOCIATED MUSIC PUBLISHERS, INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARTHUR E. GARMAIZE.

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CASES CITED

OTHER AUTHORITIES

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Proceedings and Opinions

Respondent, Associated Music Publishers, Inc., publishes and licenses the performance of copyrighted serious music. All the radio networks and in excess of 300 stations hold licenses for the performance of its repertoire.

Respondent as plaintiff below obtained summary judgment for infringement by performance by broadcast (fol. 15) of its copyrighted orchestral work entitled "Petite Suite Espagnole", consisting of four parts, "Ausencia" (Serenade), "Habanera", "Noche de Arabia" (Intermezzo) and "Baile Andaluz".

The opinion of the District Court for the Southern District of New York is reported in 46 F. Supp. 829. The opinion of the Circuit Court of Appeals for the Second Circuit affirming is reported in 141 F. 2d 852.

Summary of the Facts *

The only business of the corporate petitioner is the ownership and operation of Radio Station WEVD (fol. 73, 10Q.A.). The personal petitioner is the paid manager (fol. 74, 11Q.A.; fol. 94, 63Q.A.), exercising considerable, perhaps unrestricted, freedom in choosing the music to be broadcast (fols. 84, 85). His executive committee and board of directors "presumed at all times that anything that was copyrighted has to be purchased" (fol. 83, 29Q.A.).

The corporate petitioner was incorporated as a business corporation under Article 2 of the Stock Corporation Law (fols. 108-120). Its capital stock consists of 100 common shares without par value (fol. 116) and cumulative voting is provided for (fol. 117).

The certificate of incorporation as descriptive of purposes does not contain the words "eleemosynary", "charitable", "philanthropic", "benevolent", "educational", "religious", "cultural", "public welfare" or "public service". Its stated purpose is "to engage in the business of broadcasting" and does contain as descriptive of purposes the phrases "business of broadcasting", "business corporation", "business of this company or business of a similar nature", "business corporation law", "business", "objects of its business" and "to turn to account trade secrets, trademarks, patents, licenses, processes or formulas".

The corporate petitioner exercised its inherent right and power to declare dividends twelve days after incorporation for according to the findings of fact preceding the opinion in *Debs Memorial Radio Fund, Inc., Petitioner, v. Commissioner of Internal Revenue, Respondent,* 3 T. C. (No. 6), p. 949, 950, the following bylaw was adopted:

> "On March 27, 1928, bylaws were adopted, including:

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* Additional facts relating to the broadcast are stated in the second and third paragraphs on pages 10 and 11 under Point III, "Unfair Use".

ARTICLE VI. DIVIDENDS. Section 1. The Board of Directors shall by vote declare dividends from the surplus profits of the Company whenever in their opinion the condition of the Company's affairs will render it expedient for such dividends to be declared by them."

The record at folio 171 states that the corporation is wholly owned and operated by nominees of The Forward Association. However, the deposition of corporate petitioner's treasurer-director, in response to questions by its own attorney, stated that "those who held the stock assigned it to the new owners (nominees of The Forward Association) in consideration of the new owners assuring payment of all the debts of the corporation at that time" (fol. 101, 82Q.A., 83Q.A.).

For three years after incorporation the corporate petitioner was operated upon solicited donations (fols. 88, 172). Upon acquiring the stock The Forward Association made donations and advances to the corporation (fols. 174, 179). These donations and advances were not and are not by any binding instrument impressed with a trust dedicating their use primarily and exclusively to charitable, educational or like purposes. The absence of a trust over these funds leaves them open for use otherwise than for charitable or educational purposes.

The Forward Association in 1931 agreed to advance the corporate petitioner up to $250,000 (fols. 174, 179) with the expectation of securing repayment of all sums advanced (fols. 175, 339). The directors by resolution were to be trustees of the acquired stock until the advances were repaid (fols. 100, 174). Also in the year 1931 a resolution, "whatever legal value it may have", was adopted that none of the profits should be used for dividends (fol. 87, 46Q.A.). It is not inconsistent with the record to presume that the resolutions not to use profits for dividends and making the directors trustees for the advances were a sort of security for the loans (fol. 339) made by The Forward Association. Also in the year 1931 The Forward Association adopted a resolution to take necessary steps

at some unstated future time to reorganize the corporate petitioner so that "it shall become a membership corporation to exist and operate as a non-profit sharing corporation" (fol. 176).

This record is silent on whether the corporate petitioner pays interest upon the loans. This record is also silent on whether the corporate petitioner has claimed or secured exemption from the payment of taxes upon income and real estate by virtue of the exemptions enacted by federal and state laws in favor of eleemosynary, charitable, educational and like institutions.

The infringing performance took place on October 18, 1940. This record contains an affidavit sworn to by an accountant on April 7, 1942 (fols. 337-342), stating that the books and records of the corporate petitioner

> "as of December 31, 1941 disclose that the said defendant has an operating deficit in the sum of $40,597.67" (fol. 340).

However, the findings of fact in *Debs Memorial Radio Fund Inc., Petitioner* v. *Commissioner of Internal Revenue, Respondent,* 3 T. C. (No. 6), 949, wherein this same petitioner unsuccessfully sought exemption from taxation, show that petitioner had net income of $30,700.57 in 1940 and $6,053.68 in 1941. The findings appear at page 955 thus:

> "From 1932 to 1942, both inclusive, petitioner's income, other than a few small items of interest and miscellaneous income and $2,731.87 received in 1942 as gain on the sale of a mortgage, was from commercial broadcasting over WEVD. Its gross income from broadcasting, commissions paid, and net income or loss as shown by its Federal income tax returns were as follows:

Year ended—	*Gross income from broadcasting*	*Commissions paid*	*Net income or (loss)*
Oct. 31, 1932	$ 18,421.16	$ 957.85	($27,043.72)
Oct. 31, 1933	42,273.40	6,530.23	(33,502.23)
Dec. 31, 1933 (2 mo.)	13,103.54	2,978.24	(4,059.63)
1934	83,939.73	18,483.01	(21,703.00)
1935	173,449.10	.....	(980.96)
1936	189,948.03	.....	3,841.27
1937	225,040.95	34,847.41	15,042.33
1938	183,034.69	35,898.90	(2,627.33)
1939	284,294.41	52,855.47	9,221.69
1940	323,834.16	52,955.36	30,700.57
1941	290,385.69	55,631.10	6,053.68
1942	294,466.11	50,411.44	7,449.18"

This record shows: Advertisers are accepted (fol. 98, 74Q.A.) and they pay for the time and broadcasts of the station (fol. 90, 55Q.A.; fols. 195, 362, 363). There is no decided or absolute limit placed upon the time sold (fol. 92, 59Q.A.). Sustaining programs are broadcast to increase the listening public (fol. 96, 69Q.A.; fol. 99, 77Q.A.). The number of commercials or advertising broadcasts has increased (fol. 97, 73Q.A.). The rates charged for advertising have likewise increased (fol. 98, 75Q.A.). At one time the management devoted 33% of the time of the station to commercial or advertising programs and 67% of the time to sustaining programs (fol. 248). The record is silent upon the present relationship between sustaining and commercial programs. At one period the most valuable time of the station, Saturdays from 6 to 8 P. M. (fol. 187) and Sundays from 6 to 8 P. M. (fol. 249), was devoted to commercial programs. The record is silent on the present use of the most valuable time. "The policy is to reserve as much time for that (sustaining programs) as is possible after the operating expenses have been covered and a reasonable reserve for contingencies" (fol. 93, 60Q.A.).

POINT I

The words "for profit" in the expression "public performance for profit" embrace all means employed for the immediate or remote purpose of gain and charitable or educational institutions or purposes are not exempt from copyright infringement by performance unless they qualify within the last proviso of Section 28 of the Copyright Act.

The Copyright Act, 17 U. S. C. A. 1-e, provides:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right * * * (e). To perform the copyrighted work publicly for profit if it be a musical composition* and for the purpose of public performance for profit;"

Construing the words "for profit", this Court said in *Herbert* v. *Shanley Co.*, 242 U. S. 591, 595, 61 L. Ed. 511, 514:

> "If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough."

Except for the temporary non-distribution of its profits by virtue of a revocable resolution, the corporate petitioner functions like the National Broadcasting Company, the Blue Network, Inc., the Columbia Broadcasting System,

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* The Copyright Office prints the Copyright Act in its Bulletin No. 14. The semicolon is placed at the word "composition" and the following note at page 1 is printed: "As printed in U. S. Code, title 17, section 1, subsection (e), lines one to three read: 'To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof * * *.' As printed in this bulletin the text agrees with the construction placed thereon by Mayer, J., in *Hubbell* v. *Royal Pastime Amusement Co.*, D. C., S. D. of N. Y., 242 Fed. Rep. 1002-1003."

Inc., the Mutual Broadcasting System and other radio stations for civic, political, educational and cultural purposes generally by devoting varying amounts of station time to sustaining programs for the sole purpose of attracting a larger listening public.

Sustaining programs are not eleemosynary. They are part of a total for which the advertisers pay.

The last proviso of Section 28 reads as follows:

> "Provided, however, That nothing in this Act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

Church Co. v. *Hilliard Hotel Co.*, 221 F. 229 (overruled by *Herbert* v. *Shanley*, 242 U. S. 591), the only case found referring to the last proviso of Section 28, said at page 230:

> "We think it was to permit certain high-class religious and educational compositions to be performed at public concerts where an admission fee is charged, provided the proceeds are applied to a charitable or educational purpose."

The musical work involved in this petition is not of the class named in the exempting clause nor claimed to have been rented, borrowed or obtained from some public library, public school, church choir, school choir or vocal society, since the performance was rendered by means of a phonograph record alleged to have been purchased in the open market (fols. 168-169).

The performance involved was not given by a public school, church choir or vocal society.

Bills amending and consolidating the Acts respecting copyright heretofore introduced contained provisions ex-

empting charitable, religious and educational organizations from copyright infringement by performance. They were not enacted into law and one such was S. 3043 introduced January 8, 1940:

> "SEC. 12. No remedies shall be available under this Act in the following cases:
>
> (a) The performance of a copyrighted musical composition, with or without words, by a recognized bona fide charitable, religious, or educational organization: *Provided,* That the entire proceeds thereof, after deducting the actual reasonable cost of presenting the same, are devoted exclusively to charitable, religious, or education purposes: *And provided further,* That, no part of the proceeds of such performance shall be for the private gain of any promoter or similar participant in the enterprise."

Operation to some extent as an "open public forum for the discussion of civic, political and cultural matters" (similarly as the four radio networks and other stations) "from the educational as well as the musical point of view" (fol. 93, 60Q.A.) is too incidental and remote from the purposes of charitable, educational or like institutions to be regarded as within that class of institutions (*Medical Diagnostic Ass'n* v. *Com'r,* 42 B. T. A. 610).

A temporary and revocable resolution not to distribute profits and the status of its present parent, The Forward Association, as a membership corporation, do not aid the corporate petitioner in its ambition to become in this litigation a charitable, educational or like institution (*Produce Exchange Stock Clearing Ass'n, Inc.* v. *Com'r,* 2 Cir., 71 F. (2) 142, 143).

POINT II

Ground for invoking jurisdiction is not shown.

The Courts declined to hold that the corporate petitioner was a charitable or educational institution although at-

tributing to it some philanthropic, educational and cultural purposes and activities. Petitioners do not seek to review the failure to so hold. On the contrary the District Court said (46 F. Supp. 829, 830):

> "There is no contention, however, that the corporation is a public or charitable institution."

The Circuit Court in its opinion, 141 F. (2) 852, 855, said:

> "Both in the advertising and sustaining programs Debs was engaged in an enterprise which resulted in profit to the advertisers and to an increment to its own treasury whereby it might repay its indebtedness to Forward Association *and avoid an annual deficit* • • •." (Emphasis supplied.)
>
> "It is unimportant whether a profit went to Debs or to its employes or to the advertisers."

Debs Memorial Radio Fund Inc., Petitioner v. *Commissioner of Internal Revenue, Respondent,* 3 T. C. (No. 6), pp. 949, 960 (June 5, 1944), denying this corporate petitioner exemption from taxation, held that this petitioner was

> "organized as a business corporation with wide business powers and no charter expression of the welfare purpose of its founders, and actually engaging to a great extent in the operation of a profit business in a competitive commercial field."

The Tax Court also held at pages 958 and 959:

> "Also, it was clear in extant decisions that, although an exemption was not lost by a corporation engaging in business for profit, this was only when such business operations for profit were merely incidental to the promotion of a grand charitable purpose and activity. *Trinidad* v. *Sagrada Orden de Predicadores,* 263 U. S. 578; *Unity School of Christianity,* 4 B. T. A. 61. See also *Hanover Improvement Society, Inc.* v. *Gagne,* 92 Fed. (2d) 888.

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> Clearly the doctrine of the *Trinidad* case, the *Roche's Beach* case (96 Fed. (2d) 776), the *Hanover* case, and the *Unity School* case, can not be applied to this corporation. Its activities are to too great an extent those of a commercial broadcasting station for profit (*Associated Music Publishers* v. *Debs Mem. Radio Fund, supra**) and the profits of that part of its business are not required to be devoted to the support of its cultural sustaining program or to the promotion of social welfare."

Three courts have decided that the corporate petitioner is organized and operates for profit. These decisions rest on the facts. The novel question and conflict with *Herbert* v. *Shanley,* 242 U. S. 591, stated as ground for review, must then be found in the facts of the case. Special and important reasons for the review of facts are not stated and under Rule 38, paragraph 5, and *United States* v. *Johnston,* 268 U. S. 220, 227, this Court does not review facts.

POINT III

Petitioners' use was competing and unfair use.

The petitioners disregard the principle inherent in the doctrine of fair use that such use must fall far short of competitive use.

There was no denial that the entire work takes twenty minutes to perform (fols. 143, 150, 156), that the entire work takes up 117 pages of musical notes (fol. 156), that the portion broadcast, "Noche de Arabia", takes up thirty pages of musical notes (fol. 156), that the performance was of a quarter of the work in respect of musical notes (fol. 156) and in excess of a third of the work in respect of time (fol. 170).

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* 46 F. Supp. 829.

The petitioners conceded they "had received no permission or license from the plaintiff to perform the composition by radio broadcast" (fols. 170, 358).

Fair use permits those working in a field of science or art to make use of ideas, opinions or theories, and in certain cases even the exact words contained in a copyrighted work in that field, but does not permit the reproduction of copyrighted material to advance a purely commercial purpose—such as the sale of merchandise (*Henry Holt & Co., Inc.* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304). The petitioners here have performed the copyrighted musical work to advance the sale of the *time* of the station which in the business of radio broadcasting is *merchandise* equally as cigarettes, and as well to advance the revenue-producing elements of the station.

In *New York Tribune, Inc.* v. *Otis & Co.*, 39 F. Supp. 67, the Court said at page 68:

> "The extent and relative value of the copyrighted material, the purpose for the claimed 'fair use', and the effect upon distribution and objects of the original work are some elements entering into the determination of the issue. *Broadway Music Corp.* v. *F-R Pub. Corp.*, 31 F. S. 817."

In *Towle* v. *Ross*, 32 F. Supp. 125, it was said at page 127:

> "There is no fair or non-competing use of copyright material unless by consent."

It is obvious that the printing and publishing of one-quarter or of one-third of a work would be competitive and unfair. In the matter of reproduction, radio stations are not different from printing presses. The injury to the owner is greater because radio performance revenue nowadays is larger than the revenue from sheet music sales of serious music.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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